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IN THE

Supreme Court of the United States

OCTOBER TERM, 19__

No. _____

PETE KING, *Petitioner*,

vs.

UNITED BENEFIT FIRE INSURANCE COMPANY, A Corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Pete King, a resident and citizen of the City of Tulsa, Tulsa County, State of Oklahoma, prays that a Writ of Certioari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on May 12, 1967.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Oklahoma and the opinion of the Court of Appeals for the Tenth Circuit has not yet been reported. The latter opinion is printed in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was made and entered on May 12, 1967, and a copy is appended to this Petition following the opinion of the Court of Appeals in the appendix. A Petition for rehearing was denied on June 19, 1967. On June 27, 1967, the Tenth Circuit Court entered an order staying the mandate for a period of thirty (30) days pending application to this Court for certiorari which order provides further that if certiorari is perfected during such thirty (30) days, the stay will continue until final disposition by this Court. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Appellant, Pete King, was entitled to a jury trial on the issues formulated by the pleadings in this case as a matter of absolute right by application of existing Oklahoma Constitutional and Case law as opposed to the apparent conflicting federal case law decisions interpreting the right of jury trial in such cases.

2. Whether on this appeal under all the evidence, the Appellant, Pete King, was entitled to a jury trial on the basic issues formulated by the pleadings in the case.

3. Whether it was in the discretion of the trial Court to deny a jury trial in this case, and if so, was that discretion soundly exercised under the evidence, or, whether the trial Court abused its discretion, if any.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. Amendment VII, Constitution of the United States of America:

"In suits at common law, where the value and controversy shall exceed Twenty Dollars ($20.00), the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

II. Rule 38, F.R.C.P.:

"Jury trial of Right.

"(a) Right preserved. The right of trial by jury as declared by the 7th Amendment to the Constitution, or as given by a statute of the United States shall be preserved to the parties inviolate.

"(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing at any time after the commencement of the action and not later than ten (10) days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party."

III. Rule 39, F.R.C.P.

"When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless: (2) The Court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the constitution or statutes of the United States."

IV. Article II, Section 19, Constitution of the State of Oklahoma.

"Trial by jury. The right of trial by jury shall be and remain inviolate . . ."

V. Title 12, Oklahoma Statutes Annotated, Section 556.

"Trial of Issues. Issues of law must be tried by the Court unless referred. Issues of fact arising in action for recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived . . ."

STATEMENT OF THE CASE

Petitioner is an individual resident and citizen of the County of Tulsa, State of Oklahoma. The Respondent, United Benefit Fire Insurance Company, is a Nebraska corporation. Only diversity of citizenship vested jurisdiction of this case in the United States District Court for the Northern District of Oklahoma where Respondent here was Plaintiff and the Petitioner was Defendant.

The complaint before the trial Court alleged that the Defendant, Pete King, signed a written contract appointing him agent for United Benefit Fire Insurance Company for the soliciting and writing of bail bonds in Oklahoma. The complaint further alleged that certain bail bonds had been written by Defendant on behalf of Plaintiff pursuant to said written agreement; that certain forfeitures had occurred and that the Defendant was indebted to the Plaintiff in the amount of at least Twenty-two Thousand Six Hundred Seventy-five Dollars and 26/100 ($22,675.26) on account of moneys paid by Plaintiff due to the for-

feiture of bonds written by the Defendant. The Complaint prayed for a mandatory injunction, an accounting and a money judgment for the forfeitures together with the Court costs.

The Defendant filed his answer denying the validity of the written contract alleging that Plaintiff's approval thereon was never forthcoming and said Defendant further denied any indebtedness on said contract. Defendant made a timely written demand for trial by jury pursuant to F.R.C.P.

The trial Court on its own motion set the case for hearing before the Court without a jury and on objection of Defendant to trial without a jury found that there was no jury question since the action was one for an accounting. The trial Court over the objection of the Defendant, forced Defendant to try the case to the Court; both parties having introduced evidence and rested, the Court entered judgment for the Plaintiff in the amount of Twenty-two Thousand Six Hundred Forty-six Dollars and 06/100 ($22,646.06).

The Tenth Circuit Court of Appeals, in its opinion, expressly stated that the denial of a jury trial on the stated grounds that the action was one "for an accounting or injunction" was erroneous, but said Court affirmed the lower Court judgment upon the mistaken application of federal case authority hereinafter cited and did not apply the existing constitutional and statutory law of the State of Oklahoma in deciding the appeal.

REASONS FOR GRANTING THE WRIT

A. The Tenth Circuit Court of Appeals has decided the case at bar on an important constitutional and statutory question in a way which is in direct conflict with applicable Oklahoma Constitutional and Case law.

In the case of *Jackson, et al.* v. *General Finance Corporation,* 253 P. 2d 166 (Okla. 1953), the Supreme Court of the State of Oklahoma in a well reasoned case expressly overruled a long line of cases previously holding that the error in denying a jury trial in an action properly triable by a jury is rendered harmless where the evidence presents no legal defense and under the issues of the case, the Supreme Court of the State of Oklahoma ruled that a litigant does not waive his right to a trial by jury where a jury has been erroneously refused by offering evidence although his evidence shows no legal defense.

In the *Jackson* case, the Supreme Court of the State of Oklahoma construed Article II, Section 19 of the Oklahoma Constitution and interpreted Section 556 of Title 12, Oklahoma Statutes, 1951, in such a way as to vest in a litigant the absolute right to a trial by jury in a case such as is before the Bar of this Court on this appeal.

To the contrary, the Tenth Circuit Court of Appeals in ruling on this question applied the rule as set forth in the case of *Freeman Contractors* v. *Central Surety & Insurance Corporation,* 205 Fed. 2d 607 (8th Circuit 1953) to the effect that if on the evidence submitted there were only questions of law to be resolved or if on the factual

issues raised by the pleadings, a jury verdict in favor of Appellant would have to be set aside because of lack of substantial foundational evidence, any error in refusing a jury trial could constitute harmless error not justifying retrial.

Thus, we can readily see that the Circuit Court in ruling on Appellant King's appeal applied a Circuit Court of Appeals' decision which not only conflicts with the established case law of the State of Oklahoma, but also, we believe conflicts with the law in such cases as decided by this Honorable Court in *Beacon Theaters* v. *Westover*, 359 U. S. 500, 79 S. Ct. 948, 3 L. ed. 2d 988 (1959). *Dairy Queen, Inc.*, v. *Wood*, 369 U. S. 469, 82 S. Ct. 894, 8 L. ed. 44 (1962), *A. M. F. Tuboscope, Inc.*, v. *Cunningham*, 352 Fed. 2d 150 (10th Circuit 1965) which cases hold:

> "If there were material factual issues to be resolved, a jury was demandable as of right despite the characterization of the action as one for an accounting or injunction."

Had the Defendant King sought a Writ of Mandamus against the trial Court, we believe that under the authority of *Beacon Theaters* v. *Westover, supra, Dairy Queen, Inc.*, v. *Wood, supra,* and *A. M. F. Tuboscope, Inc.*, v. *Cunningham, supra,* the trial Court would have been compelled by a writ to grant a jury trial as a matter of right to this Appellant. We further believe that the question involved in this appeal involves a matter of substantive law as opposed to procedural law and that therefore the law of the State of Oklahoma as set forth in *Jackson, et al.*, v. *General Finance Corporation, supra,* should control.

See also: 78 A. L. R. 888 and *Pritchard* v. *Norton*, 106 U.S. 124, 27 L. ed 104, 1 S. Ct. 102.

B. The Tenth Circuit Court of Appeals has departed from the usual course of judicial proceedings by affirming the judgment of the trial Court and in so doing erroneously placed itself in a position of a jury by weighing the conflicting evidence before it so as to call for an exercise of this Court's power of supervision.

As hereinabove set forth, we have shown this Court that the Tenth Circuit Court of Appeals had applied certain Circuit Court of Appeals' rulings which are contrary to the law as established by this Court in *Beacon Theaters* v. *Westover, supra, Dairy Queen, Inc.*, v. *Woods, supra,* and the very recent case of *A. M. F. Tuboscope, Inc.*, v. *Cunningham.* Petitioner believes that this Court should exercise its supervisory powers in order to settle the question of whether or not a party under the circumstances as formulated by the pleadings in this case is entitled to a jury trial as a matter of absolute right and whether or not said party is compelled to proceed to trial in a case which is admittedly a jury case at the peril of having waived his right to a jury trial by presenting evidence. We believe that the decisions of the Supreme Court of the State of Oklahoma and the decisions of this Court should control over Circuit Court of Appeals decisions in a matter of this nature which involves matters of substantive law as opposed to procedural law and that this issue should be settled clearly and unmistakably by this Court.

Under any circumstance, this Court should in the exercise of its supervisory power over the inferior appellant courts, accept jurisdiction of this appeal and require the Tenth Circuit Court of Appeals to apply the law as established by the decisions of this Court as hereinabove set forth, and, if necessary review the record in this case which record will clearly disclose that the appellant Court has undertaken to weigh the conflicting evidence which was before the trial court.

CONCLUSION

The ruling of the Tenth Circuit Court of Appeals is clearly erroneous in that in the first instance it applied federal case decisions instead of the applicable constitutional and case law of the State of Oklahoma as well as the applicable law of this Court in such cases. Secondly, the Tenth Circuit Court of Appeals has very clearly undertaken to weigh the conflicting evidence before the trial court in reaching its decision and has in effect undertaken to be a jury in this case.

There were no compelling reasons for the trial judge to deny Appellant his constitutional and statutory right to a trial by jury. This Court has continuing concern for the manner in which justice is dispensed in the federal appellant courts and this case is therefore one of those cases where the Court of Appeals has so far departed from the settled rules of applicable law, having applied only conflicting Circuit Court of Appeals decisions as opposed to the settled law as prescribed by this Court and

the Supreme Court of the State of Oklahoma, so as to justify a hearing on certiorari, and, the writ should therefore be granted.

Respectfully submitted

JEFFERSON G. GREER,
300 Pythian Bldg.,
Tulsa, Oklahoma,
Counsel for Petitioner.

PAUL E. GARRISON,
300 Pythian Bldg.,
Tulsa, Oklahoma,
(*Of Counsel on Petition.*)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH 1967 TERM

No. 8732

PETE KING, Appellant,

vs.

UNITED BENEFIT FIRE INSURANCE COMPANY,

a corporation, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Paul E. Garrison, for Appellant.

Tom D. Capshaw (Pierce, Mock, Duncan, Couch & Hendrickson with him on the briefs) for Appellee.

Before MURRAH, Chief Judge, HICKEY, Circuit Judge and CHRISTENSEN, District Judge.

CHRISTENSEN, District Judge

The principal problem involved in this diversity case is whether there was prejudicial error in the refusal of the lower court to grant trial by jury or whether the issues relating to the execution of a contract between the parties and any indemnity due thereunder were purely matters of law or of uncontroverted facts allowing summary disposition.

The appellant, Pete King, is a citizen of the State of Oklahoma. The appellee, United Benefit Fire Insurance Company, is a corporation licensed in the State of Ne-

braska to become surety on bail bonds in civil and criminal actions, with its principal place of business in that state. In July, 1960, appellant signed an Executing Agent's Contract appointing him executing agent of the appellee for the soliciting and writing of bail bonds in Oklahoma. He was thereupon issued powers of attorney by the appellee and during the period of August, 1960, to September, 1964, he did in fact write bail bonds wherein appellee was named as surety and which were paid by appellee in the event of forfeiture of bail by the courts.

On June 8, 1965, this action was commenced by the appellee insurance company. The complaint alleged, among other things, that "the defendant has been the agent of the plaintiff for the writing of bail bonds . . . pursuant to an agreement between plaintiff and defendant . . .", that "plaintiff has issued to defendant many powers of attorney to writ bail bonds binding plaintiff", that "according to the terms of the . . . agreement, defendant is required to indemnify plaintiff for all loss incurred as a result of the execution of any bond written by defendant . . . (and) defendant remains indebted to plaintiff in the amount of at least $22,675.26 on account of moneys paid by plaintiff due to the forfeiture of bonds written by the defendant . . ." The complaint prayed for a mandatory injunction restraining defendant from further use of certain bond powers of attorney still in his possession, an order prohibiting defendant from acting as an executing agent of plaintiff, and accounting, and a money judgment for forfeitures and costs paid by defendant. By way of answer to the complaint, defendant denied,

among other things, plaintiff's allegations concerning his indebtedness to plaintiff, and alleged that the written agreement never became legally binding because its validity was conditioned upon plaintiff's approval which was never forthcoming.

Appellant made a timely written demand for trial by jury. Appellee subsequently filed an amendment to the complaint alleging that if the execution of the written agreement were insufficient, it was nonetheless binding upon both parties by ratification.

When the case came on for trial counsel for appellant moved for a continuance both by reason of the illness of his client and in reliance upon his demand for a jury, apparently unavailable at the time. The court denied the motion for a continuance, ruled that there was no jury question, particularly in view of the nature of the action as one for injunction or an accounting, and proceeded to try the case. At the conclusion of the evidence, the court entered judgment for the appellee for $22,646.06 and further ordered the appellant to surrender and deliver to the appellee certain unused powers of attorney. Only the money judgment is in question here.

We cannot say that the refusal to grant the continuance was an abuse of discretion. The motion for a continuance was not made until the morning of the trial, although an unsuccessful effort to notify the opposing party of the intention to so move had been made the preceding day when the illness of the defendant first became known to his counsel. It did appear that the de-